IN THE

# Supreme Court of the United States

October Term, 1972

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No. 72-851

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THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

*Petitioners,*

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

*Respondents.*

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## BRIEF FOR THE PETITIONERS

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### OPINION BELOW

The opinion of the Court of Appeals appears in the petition, Appendix pp. 14-29, and is reported at 464 F. 2d 916.

### JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1972, and motion for rehearing was denied on September 11, 1972. The petition was filed on December 9, 1972 and was granted on June 4, 1973. The jurisdiction of this Court rests on 28 USC 1254(1).

## QUESTIONS PRESENTED

1. Whether the federal court has jurisdiction of this suit as arising under the Constitution, laws, or treaties of the United States pursuant to 28 U.S.C. 1331, headed "Federal question; amount in controversy; costs".

2. Whether the federal court has jurisdiction of this claim of the Oneida Indians as arising under the Constitution, laws, or treaties of the United States pursuant to 28 U.S.C. 1362, headed "Indian tribes".

3. In a broader sense, the question presented by this case is whether an Indian tribe can protect its tribal lands where: (a) the federal authorities refuse to help and (b) the Indian tribe is denied access to state courts.

## STATUTES INVOLVED

### Federal

### 25 USC 175

§ 175. United States attorneys to represent Indians

In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity. Mar. 3, 1893, c.209, § 1,27 Stat.631; June 25, 1948, c.646, § 1,62 Stat.909.

### 25 USC 177

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of

the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. R.S. §2116.

**25 USC 233**

§233. Jurisdiction of New York State courts in civil actions

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: ... Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: And provided further, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: Provided further, *That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.* Sept. 13, 1950, c.845, § 1,64 Stat. 845. [Emphasis added.]

**28 USC 1331**

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

## 28 USC 1362

§ 1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. Added Pub.L. 89-635, § 1, Oct. 10, 1966, 80 Stat. 880.

## EXCERPTS FROM FEDERAL TREATIES INVOLVED

*Treaty with Six Nations — Ft. Stanwix 1784*

"Article 2. The Oneida and Tuscarora Nations shall be secured and confirmed in the possession of lands on which they are settled."

*Treaty with Six Nations — Ft. Harmar 1789*

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

*Treaty with Six Nations — Canandaigua 1794*

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article [illegible] Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

*Treaty with Oneida, Tuscarora and Stockbridge Indians — Oneida 1794*

"Whereas, In the late war between Great Britain and the United States of America, a body of the Oneida and Tuscarora and Stockbridge Indians adhered faithfully to the United States and assisted them with their warriors, . . . and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them . . ." (Here followed promises to erect a sawmill and other improvements on the Reservation and to compensate the Oneidas for damages suffered in the War.)

## STATEMENT OF FEDERAL POLICY BY PRESIDENT GEORGE WASHINGTON TO NEW YORK INDIANS 1790

"I the President of the United States, by my own mouth, and by a written speech signed with my own hand, and sealed with the seal of the United States, speak to the Seneca nation, and that they would keep this speech in remembrance of the friendship of the United States.

* * * * *

"I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their lands, since the peace. But I must inform you that these evils arose before the present Government of the United States was established, when the Separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.

*"Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.*

"Hear well, and let it be heard by every person in your nation, that the President of the United States declares, that

the *General Government considers itself bound to protect you* in all the lands secured to you by the treaty of fort Stanwix, the 22d of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of you. You complain that John Livingston and Oliver Phelps, assisted by Mr. Street, of Niagara, have obtained your lands, and that they have not complied with their agreement. It appears, upon inquiry of the Governor of New York, that John Livingston was not legally authorized to treat with you, and that every thing that he did with you has been declared null and void, so that you may rest easy on that account. But it does not appear, from any proofs yet in possession of Government, that Oliver Phelps has defrauded you.

"*If, however, you have any just cause of complaint against him, and can make satisfactory proof thereof, the federal courts will be open to you for redress,* as to all other persons. But your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in future, you cannot be defrauded of your lands; that you possess the right to sell, and the right of refusing to sell, your lands; that, therefore, the sale of your lands, in future, will depend entirely upon yourselves. But that, when you find it for your interest to sell any part of your lands, the United States must be present, by their agent, and will be your security that you shall not be defrauded in the bargain you may make.

* * * * *

"That besides the before mentioned security for your land, you will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians. For the particular meaning of this law, I refer you to the explanation given thereof by Colonel Timothy Pickering, at Tioga, which, with the law, are herewith delivered to you." 1/ (Emphasis added)

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1/ American State Papers (Indian Affairs, Vol 1, 1832), p. 142. From a statement made by President George Washington to a delegation of New York Indians in 1790. Colonel Pickering's explanation at Tioga, to which the President referred, mentioned previous frauds practiced by "some white men", and then said: "Now, Brothers, to prevent these great evils in future, the Congress declare That no sale of lands made by any Indians, *to any person or persons, or even to any state,* shall be valid (or of force) unless the same be

[footnote continued]

## STATEMENT OF FACTS

The Oneida Indian Nation of New York and The Oneida Indian Nation of Wisconsin brought this suit against the Counties of Oneida and Madison, located in the State of New York.

Plaintiffs contend that the respondents occupy lands which the State of New York obtained in 1795 in violation of the Indian Non-Intercourse Act, 1 Stat. 137 (1790), later Rev. Stat. §2116, and now 25 U.S.C. §177. The 1790 Act provided, *inter alia:*

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Prior to the contested cession in 1795, the Plaintiffs had a Reservation in Upstate New York. In 1795, representatives of the State of New York negotiated a "treaty" with the Plaintiffs whereby the Plaintiffs ceded a portion of their land, for what the complaint alleges was unfair and inadequate consideration. This 1795 "treaty" was obtained without federal consent and was never ratified in any way by the United States, and, consequently, was in violation of the above cited Indian Non-Intercourse Act and the treaties invoked in the complaint. 2/

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1/ [continued]
made at some public treaty held under the authority of the United States. For at such public treaty *wise and good men* will be appointed by the President to attend, *to prevent all deception and fraud.* These Wise & Good men will examine every deed before it is signed and sealed, *and see that every lease or purchase of the Indians be openly and fairly made*" (emphasis added). See Op. of Court of Claims in *Seneca Nation of Indians* v. *United States*, Ind. Cl. Com. Docket #342-A, 368-A, (Ct. Cl., Dec. 17, 1965), from which Pickering quote is taken.

2/ Pursuant to their treaties, the Oneida Indians have petitioned for relief herein to both the President of the U.S. (1968) and the Governor of NY (1967); both petitions were denied.

Plaintiffs in this suit claim damages for the respondents' occupancy of the Plaintiffs' land for the period January 1, 1968 to December 31, 1969. The fair rental value of such premises for this period amount to at least $10,000 exclusive of interest and costs.

In the United States District Court for the Northern District of New York, petitioners asserted jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1362 and other sections of 28 U.S.C.

The District Court dismissed the complaint for lack of jurisdiction and held that the case should properly be tried in New York State Courts. In affirming, the Court of Appeals reasoned that the Plaintiffs' complaint was an action "basically in ejectment" and therefore a well-pleaded complaint need not contain allegations of the Oneidas' source of asserted title to the contested property. Consequently, held the Court, the action did not "arise under" the Constitution, laws, or treaties of the United States (28 U.S.C. §1331), even though the Plaintiffs' assertion of title in their complaint is founded on federal statutes and treaties. The Court of Appeals concluded that the "arising under" language of §1362 should be interpreted similarly to the "arising under" language of §1331, and hence under §1362 there was likewise no federal question.

Judge Lumbard dissented, suggesting that the "arising under" language of §1362, passed into law in 1966, should not necessarily be interpreted as the same language in §1331. Judge Lumbard also noted that since the case would turn exclusively on interpretation of federal law and federal treaties, this case "should be considered to arise under the laws, as well as the treaties of the United States."

## SUMMARY OF ARGUMENT

Jurisdiction is claimed under two statutes, 28 U.S.C. 1331 and 28 U.S.C. 1362.

## 28 U.S.C. 1331

With respect to Section 1331, the case arises under the treaties and laws of the United States in the classic sense. The Second Circuit in our case and in *Deere* v. *St Lawrence River Power Co.*, 32 F2d 550 (2d Cir. 1929), did not recognize the distinction between *Taylor* v. *Anderson*, 234 U.S. 74 (1914), and cases arising in New York; namely, that the courts of New York may not hear this case, whereas the state court in *Taylor* did have jurisdiction. In another Second Circuit case, *Tuscarora Nations of Indians* v. *New York Power Authority*, 257 F.2d 885 (2d Cir. 1958), *vacated as moot sub nom. McMorran* v. *Tuscarora Nation of Indians*, 362 U.S. 608 (1960), *modifying* 164 F. Supp. 107 (W.D.N.Y. 1958), the lack of a state court forum was a factor in the court's assuming jurisdiction.

In Indian land cases, "possession"or the presumed lack of it should not be controlling where U.S. laws and treaties guarantee such possession to the Indians. Prior decisions of the Second and Ninth Circuits assuming jurisdiction in land cases are analyzed to demonstrate that possession has not uniformly been used as the sole criterion of whether a case "arises under" the treaties and laws of the United States.

In the view of the majority of the Second Circuit, the treaties' guaranty of possession would be self-cancelling: If the Oneidas do not have the possession which treaties guarantee, they may not have a federal forum in which to assert their rights to the guaranted possession. This is not a tenable use of the "arising under" test.

## 28 U.S.C. 1362

Jurisdiction is also claimed under the broader scope of Section 1362. See dissent of Judge Lumbard in the Court below. Legislative history shows clearly that 28 U.S.C. 1362 was enacted to cover cases, like the Oneidas' case, where the United States Attorney General refuses to act under 25 U.S.C. 175.

Congress intended 1362 to be a remedial "Indian" statute, rather than just a limited exception of the $10,000 jurisdictional amount rule. It used "arising under the Constitution, laws or treaties of the United States" in the constitutional grant sense, rather than with the more restrictive meaning that has developed for 28 U.S.C. 1331. The examples given to Congress by Senator Burdick, who introduced the bill, and in the Committee Reports have no relation to the "arising under" rule as interpreted by the Second Circuit in our case and in the *Deere* case, 32 F.2d 550 (2d Cir. 1929). The Ninth Circuit in May 1973 decided the same issue contra to the Second Circuit and in favor of jurisdiction under 28 U.S.C. 1362. See Exhibit B of this brief.

This case has a broad policy impact on American Indians, who are precluded by federal law from commencing land cases in courts of many states. 25 U.S.C. 233, 28 U.S.C. 1360. As recognized by the drafters of 28 U.S.C. 1362, there are many instances where the United States Attorney may not or will not act to protect Indian lands. If the decision below stands, an Indian tribe in such case, once ousted from possession, will have no legal forum to assert its rights.

## OUTLINE OF ARGUMENT

## ARGUMENT

### I.

### THE OVERRIDING LEGAL PREMISE FOR JURISDICTION IS THAT THE UNITED STATES GOVERNMENT, NO LESS THAN ANY INDIVIDUAL CITIZEN, MUST OBEY ITS OWN TREATIES, LAWS, AND PROMISES.

The cases under 28 U.S.C. 1331 and the legislative history of 1362 should be considered with the above premise in mind. The dignity of the treaties herein involved is exemplified in the opinion of this Court in *Federal Power Comm'n.* v. *Tuscarora Indian Nation*, 362 U.S. 99, 121-25 (1960) expecially footnote 18 at 121-22.

In the *Tuscarora* case, the Supreme Court held that the taking of land for a reservoir:

> "...did not breach the faith of the United States, or any treaty or other contractual agreement...in respect to these lands for the *conclusive reason that there is none.*" *Id.* at 124 (emphasis added).

In other words, no treaty or agreement concerning the lands near Niagara Falls taken from the Tuscaroras was before the Court. Footnote 18, *Id.* at 121-22 held that the treaty invoked by the Tuscaroras referred only to "...lands in central New York about 200 miles east of the lands in question..." These lands "200 miles east" are the very Reservation lands involved in the Oneidas' case.

In the Oneidas' case, now before this Court, there are *three treaties* promising the Oneidas "possession" of their Reservation.

Therefore, the failure of the United States to take action with respect to the Oneidas' Reservation would constitute a breach of treaties and laws of the United States.

## II.

## THE ONEIDA INDIANS DO NOT HERE SEEK DRASTIC REMEDIES, SUCH AS EJECTMENT, BUT ONLY AN EQUITABLE RECOGNITION OF THE CURRENT VALUE OF THEIR LOST RESERVATION.

The complaint asks, in effect, for an equitable accounting for the value of the Oneidas' interest in their Reservation. This action is not one in ejectment, as the Second Circuit concluded. The relief demanded in the complaint was modeled on the remedy ordered by the Second Circuit Court of Appeals in *United States* v. *Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694 (1942). (The City of Salamanca, N.Y. was ordered to pay a modest ground rent to the Senecas.)

## III.

## THE ONEIDA INDIANS DO NOT HAVE ACCESS TO THE COURTS OF NEW YORK STATE.

### A. NEW YORK LAW HAS BARRED INDIAN TRIBES FROM STATE COURTS.

Even in the days when New York courts did not recognize federal supremacy in Indian land matters, the courts of New York barred Indian claims from being heard therein. This is a basic element of the fairness of the Oneida Indians' cause.

It is the law in New York that an Indian Tribe is not a person or entity capable of initiating a lawsuit. This is demonstrated by the fact that under Section 8 of the New York Indian Law, the responsibility of protecting tribal lands rested with the County Judge and not with the tribe as plaintiff. 3/

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3/ See discussion of Section 11-A of the New York Indian Law below.

A tribe cannot sue or be sued in New York except where authority has been conferred by statute. Likewise, a suit cannot be brought by an individual in the name of the tribe in the absence of statutory authority, or by a portion of the tribe separated therefrom.

In *Strong* v. *Waterman*, 11 Paige 607 (1845), the chancellor of the State of New York, was asked to review an injunction granted to the Indians of the Seneca Nation against trespasses on their lands. The court found no common law or statutory basis for jurisdiction but permitted the injunction to stand since the Indians had rights but no remedies.

However, the Court of Appeals of New York has specifically overruled this decision, thus denying Indians access to New York courts in land cases. In *Johnson* v. *Long Island Railroad Co.*, 162 N.Y. 462, 56 N.E. 992 (1900), the court discussed *Strong* v. *Waterman* and overruled it holding that neither an Indian tribe, an individual Indian or a group of Indians with similar causes of action have access to the courts of New York without specific legislation:

> "As already intimated, we do not regard *Strong* v. *Waterman* (supra) as authorizing this action.
>
> A decision holding that this action could be maintained either by the tribe, or an individual member thereof, on behalf of himself and all others who should come in and contribute, would be contrary to the policy and practice which have been long established in our treatment of the Indian tribes. They are regarded as the wards of the state, and generally speaking, possessed of only such rights to appear and litigate in courts of justice as are conferred upon them by statute.
>
> It is conceded by the complaint in this action 'that the tribe have no legal capacity to sue therefor and have no corporate name by which they can institute such a suit.'
>
> The theory of an action by one for the benefit of all is, that where a large number of persons, not incorporated, are vested with a cause of action, it may be enforced in that manner, but when it is admitted, as in this case, that the tribe has no cause of action, it follows, logically, that no one member of the tribe could sue for the benefit of all, as the cause of action does not exist.

> We are of opinion, however, that the Montauk Tribe of Indians are not without legal redress in the premises, as by an application to the legislature an enabling act can be obtained allowing action to be brought on behalf of the tribe, in the name of its chief or head, or in the name of such member or members thereof as may be selected." *Id.* at 466-67.

The Court's reasoning seems circular but the legal effect continued: Indian land actions like the Montauks' were barred from New York State Courts, until state enabling legislation could be passed.

As it happened, the Montauks *did* obtain an enabling act in 1906 and the case again went to the Court of Appeals, *Pharoah* v. *Benson*, 164 App. Div. 51, 149 N.Y.S. 438, *aff'd.*, 222 N.Y. 665, 118 N.E. 1079 (1918), which confirmed the *Johnson* rule:

> "In the absence of express statutory authority therefore, no action will lie in the courts of this state in the name of any tribe of Indians, nor in the name of any Indian a member of such tribe suing in behalf of himself and all others similarly situated." *Id.* at 52.

The New York Court then utilized a second line of defense and held that the Montauk Indians were not an Indian tribe under the enabling statute, and therefore had no right to sue.

A more recent declaration of this rule is found in *Andrews* v. *State*, 192 Misc. 429, 79 N.Y.S. 2d 479 (Ct. Cl. 1948), *aff'd.*, 276 App. Div. 814, 93 N.Y.S. 2d 705 (1949):

> "The general rule seems to be that a tribe cannot sue or be sued in this state, except where authority has been conferred by statute...Likewise, a suit cannot be brought by an individual in the name of the tribe in the absence of statutory authority...or by a portion of the tribe separated therefrom." *Id.* at 485.

In the case of *St. Regis Tribe* v. *State*, 4 Misc. 2d 110, 158 N.Y.S. 2d 540 (Ct. Cl. 1956), *rev'd on other grounds*, 5 App. Div. 2d 117, 168 N.Y.S. 2d 894 (1957), *aff'd.*, 5 N.Y. 2d 152 N.E. 2d 411, 177 N.Y.S. 2d 289 (1958), *cert. denied*, 359 U.S. 910 (1959), the State in a Court of Claims action contended that the

Tribe lacked legal status to sue. In his affidavit in support of the State's motion to dismiss, Assistant Attorney General, Donald C. Glenn, deposed and said:

> "3. Relating to capacity to sue:
>
> Assuming, but not conceding, that the American St. Regis Tribe of Indians had any independent interest in Barnhart's Island, which was appropriated by the State of New York, such interest belonged to the Tribe collectively. *In the absence of specific statutory authority, an Indian Tribe does not have capacity to sue since it is not a recognized legal entity.* Similarly, an action involving tribal property cannot be maintained by the Chiefs or members of the Tribe, suing in their individual capacity and also for the benefit of all other tribal members, because the interest is tribal, not individual. *Only the Legislature may permit bringing of a suit pertaining to a tribal interest in real property;* but neither the general provisions of the Indian Law, nor Article eight thereof which specifically deals with the St. Regis Tribe, authorize claimants to prosecute the instant claim.
>
> Since there is no enabling act which would allow this suit, claimants lack legal capacity to sue and the claim must be dismissed." (Emphasis added.)
>
> [From *Record on Appeal to N.Y. Court of Appeals, St. Regis Tribe, etc.*, v. *State of New York*, at 31-32.]

The St. Regis Indians did not dispute this point as a general rule, but claimed specific statutory permission. The Court of Claims held that such specific permission *did* exist in the *St. Regis* case:

> "The — [State's] — motion must be and hereby is denied on this particular ground. We limit our decision specifically to the cited and quoted statutes as they authorize or may authorize the exercise of the right of eminent domain. *St. Regis Tribe* v. *State*, 4 Misc. 2d 110, 117, 158 N.Y.S. 2d 540, 549 (Ct. Cl. 1956).

In effect, the *St. Regis* case confirmed the long-standing rule that an Indian Tribe, as such, cannot sue in New York courts.

The New York legislature in 1958 added the following to the Indian Law:

§ 11-a. Recovering possession of reservation land.

In addition to any other remedy provided by this chapter or by any other law, the council, chiefs, trustees or headmen constituting the governing body of any nation, tribe or band of Indians may in the name and on behalf of such nation, tribe or band, maintain any action or proceeding to recover the possession lands of such nation, tribe or band unlawfully occupied by others and for damages resulting from such occupation. Added L. 1958, c. 400, eff. April 7, 1958." N.Y. Indian Law § 11A (McKinney Supp. 1972).

This statute and 25 USC §33 (discussed below) must be construed together. The result must be that Indian land cases which "relate to transactions or events transpiring prior to September 13, 1952" are foreclosed from the jurisdiction of New York Courts since that jurisdiction was not granted to New York State by Congress.

## B. FEDERAL LAW HAS BARRED INDIAN LAND CLAIMS FROM NEW YORK STATE COURTS.

Since the challenged transaction occurred in 1795, the New York State courts are barred from entertaining claims of the Oneida tribes by the Fifth proviso to 25 U.S.C. 233:

> "*Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1953."

Despite the clear statutory bar to the jurisdiction of the New York State courts over the land claims of the Oneida tribes, the United States has argued in Footnote 3 of its amicus curiae memorandum that New York courts may have jurisdiction here apart from 25 U.S.C. Section 233.

The United States has ignored this Court's decisions, discussed in detail in *Williams* v. *Lee*, 258 U.S. 217 (1959) and the legislative history of 25 U.S.C. §233. *Williams* v. *Lee*, supra, affirmed the long-standing principle of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1932) that state courts are without jurisdiction over Indian affairs. While recognizing that there have been some

judicial modifications to the rule of *Worcester* v. *Georgia*, this Court stated at page 221 of its *Williams* opinion:

> "Significantly, when Congress has wished the states to exercise this power [civil and criminal jurisdiction] it has expressly granted them the jurisdiction which *Worcester* v. *Georgia* had denied."

Therefore, the New York courts have no jurisdiction apart from the section 233 unless specifically granted by Congress. Research has not disclosed any Congressional or judicial grant of jurisdiction to the New York courts over Indian land claims arising out or pre-1953 events. The issue is not an open question for the state courts.

The fifth proviso in Sec. 233, as quoted above was not in the bill (S. 192) as originally introduced in Congress. It was added at the request of certain New York Indians. See Congressional Record—House for July 27, 1950, page 11400. The explanation given by Congressman Morris therein shows clearly that Congress assumed that Indian land claims arising before September 13, 1952 could be heard in federal courts. See following excerpt:

> "These amendments will preserve those -(treaty)- rights. Then in addition thereto they will preserve their right to go into the United States courts in regard to claims that they might have growing out of any transactions in regard to land dealings and so forth, with the State of New York. In other words, Mr. Speaker, I believe that these particular amendments are such that there can be no real objection now."

The Congressional Record—House for August 14, 1950, at page 12664, contains further explanation:

> "In addition thereto, of course, they may go into the Federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands or claims in regard thereto, and I am sure that the State of New York should have and no doubt will have, no objection to such provision."

Rep. Morris also stated

> "This just [the Fifth proviso] assures the Indians of an absolutely fair and impartial determination of any claims they might have had growing out of any relationship they have had with the great state of New York in regard to their lands."

In expressly denying jurisdiction to the New York State courts over Indian land claims arising out of pre-1953 events, Representative Morris and Congress seemed to have the instant situation in mind. Although New York State is not a party defendant, it is indirectly involved in this litigation. To avoid any conflict, apparent or real, Congress deprived the courts of New York of jurisdiction in civil actions involving Indian lands or claims relating to events occurring before 1953. 4/

## IV.

## BECAUSE OF THE THREE TREATIES INVOKED THEREIN, THE COMPLAINT STATES A CAUSE OF ACTION ARISING UNDER THE LAWS OF THE UNITED STATES WITHIN THE MEANING OF 28 U.S.C. 1331.

### A. PREAMBLE

This section of the Oneidas' brief will analyze the law under 28 U.S.C. 1331 as applied to the particular facts before the Court. Initially, the analysis shows that the three treaties, in and of themselves, bring this case under 1331. Next, the concept of "possession", which the majority opinion below thought crucial, is examined in the light of prior decisions of the Second and Ninth Circuits. Finally, the point is made that this is not an action in ejectment, but rather a plea for equity and justice in form which will leave undisturbed the occupancy of the persons presently residing on the Oneidas' Reservation.

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4/ The Court of Appeals, 464 F. 2d 916 (1972) in Footnote 9 of its opinion assumed that the New York courts would not have jurisdiction over the claim of the Oneida tribes. See also "Federal Indian Law" 363-64.

## B. THIS CASE "ARISES UNDER" THE THREE TREATIES INVOKED IN THE COMPLAINT

To the majority of the Court below, the fact that the Oneida Indians are not in possession of their Reservation is fatal to federal jurisdiction. It distinguished the *Tuscarora*, 257 F.2d 885 (2d Cir. 1958), case on the basis that there the Indians were in possession of their land and stated that, because the Oneidas were not in possession:

> "...on the rather technical view taken by the Supreme Court, their action does not 'arise' thereunder." (Meaning under the laws, etc. of the United States.) Petition, p. 21.

We believe the Second Circuit's distinction on the basis of possession to be untenable because the very treaties under which the Oneidas are suing and invoke in their complaint promise them "possession" of the land in question:

> "The Oneida and Tuscarora Nations shall be secured in the *possession* of lands on which they are settled." (Emphasis added; Treaty of 1784.)
>
> "The Oneida and Tuscarora Nations are also *again secured and confirmed* in the *possession* of their respective lands." (Emphasis added; Treaty of 1789)
>
> "...the said reservation *shall remain theirs* until they choose to sell the same to the people of the United States...". (Emphasis added; Treaty of 1794)
>
> "No purchase, grant, lease, or other conveyance of lands...*shall be of any validity in law or equity...*" (Emphasis added; 25 U.S.C. 177)
>
> "...The General Government will never consent to your being defrauded, but it will protect you in your just rights..." (Promise of George Washington)
>
> "...the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself *from the fact of previous possession* or ownership." (Emphasis added; 25 U.S.C. 194)

Since all of the foregoing were quoted and invoked in the Oneidas' complaint, the cause of action is not one of ejectment but rather a special one created by the treaties and laws and promises of the United States.

Whatever policies existed, or may exist, requiring the "ejectment" rule are not applicable to the factual situation presented in this case. The United States has refused to honor its statutory duty, to represent the interest of the Oneidas and the Oneidas have been and are now barred from state courts. 5/

Under these facts in a suit under a federal treaty guaranteeing "possession", the fact of non-possession should not bar the recipient of the guaranty from federal court.

## C. THE USE OF POSSESSION VS. NON-POSSESSION AS THE SOLE CRITERION OF FEDERAL JURISDICTION IS NOT IN ACCORD WITH OTHER DECISIONS OF THE SECOND AND NINTH CIRCUIT COURTS OF APPEAL.

In two prior cases, Circuit Courts of Appeal have held that Indian tribes *not in possession* of the disputed land could protect their rights in federal court. The first such case was *Tuscarora Nation of Indians* v. *New York Power Authority*, 257 F. 2d 885 (2 Cir. 1958). As shown in the opinion of the District Court, which raised the jurisdictional issue and then assumed jurisdiction, the Superintendent of Public Works of New York State was authorized to "obtain possession according to the procedure provided by Section thirty of the highway law..." *Tuscarora Nation of Indians* v. *New York Power Authority*, 164 F. Supp. 107, 109 (W.D.N.Y. 1958). In April 15, 1958, the Power Authority did take over the right to possession of the land in question by filing a condemnation map under Section 30 of the State Highway Law. See Opinion of Second Circuit 257 F. 2d 887, 888. As alleged in paragraph 9 of the Tuscarora

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5/ 25 U.S.C. 195. The Oneidas have requested the help of the U.S. Attorney in the basic issue, and also on appeal to the Second Circuit on the sole issue of jurisdiction. In each case the help was denied because of an alleged conflict of interest in a case the Oneidas have before the Indian Claims Commission relating to the same "treaties" with New York State.

complaint, dated April 18, 1958, the power authority asserted its right to possession under Section 30 and attempted to enter the Tuscaroras' property. 6/

The other relevant "possession" case is *Skokomish Indian Tribe* v. *France*, 269 F.2d 555 (9th Cir. 1959). In that case the Indians claimed certain tidelands located adjacent to their acknowledged reservation. In 1889 the State of Washington asserted ownership of the tidelands, adversely to the Indians, and granted and leased them to the non-Indian predecessors of the defendants in the action. The Indians *were not in possession* of the lands claimed at the time of commencement of the action.

The defendants there raised the same jurisdictional issues as did the defendants in our case. The Ninth Circuit held that there was jurisdiction under 28 U.S.C.A. 1331, because interpretation of the treaty was the crux of the case. It did not find controlling the fact that the Indians were not in possession. (Ultimately the Indians lost because the Court, having taken jurisdiction, held that the legal description of the reservation did not cover the disputed tidelands.)

The main factual difference between the *Skokomish*, *Tuscarora*, and *Oneida* cases is the fraction of the original land currently possessed as compared to the fraction possessed by the defendant. The difference is one of degree, not of kind.

## D. TAYLOR V. ANDERSON, 234 U.S. 74, DISTINGUISHED

Both the majority opinion below and counsel for defendants have cited the decision in *Taylor* v. *Anderson*, 234 U.S. 74 (1914), as controlling here. The Second Circuit also relied on *Taylor* in its decision in *Deere* v. *St. Lawrence River Power Co.*, 32 F.2d

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6/ According to Edmund Wilson's "Apologies To The Iroquois", the state's engineers and work crews had already moved onto the land and several Indians were arrested for trying to oust them and to prevent further entry.

550 (2d Cir. 1929). The *Taylor* case is unlike the Oneidas' case in that the plaintiffs in *Taylor* had an available remedy in the courts of the State of Oklahoma. The Oklahoma District Court, *Taylor* v. *Anderson*, 197 F.Supp. 383, 388 (E.D. Okla. 1911) pointed out:

> "[3] Should the plaintiffs hereafter commence this action in the proper state court, and the defendants there set up in their answer the defense which the plaintiffs anticipate, then a federal question will be presented which the state court in the first instance has jurisdiction to determine. If the decision of the trial court on this federal question be adverse to the plaintiffs, they may appeal to the Supreme Court of the state. If the decision of that court on that question be again adverse the plaintiffs, they may appeal to the Supreme Court of the United States and thus finally have the question decided by a federal court."

and the Supreme Court referred to this alternative in saying:

> "Whether or not in other respects the plaintiffs overlooked an authorized mode of securing relief to which they may be entitled need not now be considered." 34 S. Ct. 725.

In *Taylor* the plaintiffs were individuals bringing an avowed ejectment action to regain possession of land allotted to an Indian predecessor in title, and the federal district court assumed that the plaintiffs as individual Indians could sue in the courts of the State of Oklahoma (as distinguished from New York where they may not).

## SUMMARY: 28 U.S.C. 1131

Under the facts here, the District Court does have jurisdiction under 28 U.S.C. 1331.

The Second Circuit's use of the "arising under" test as applied to ejectment cases would be appropriate in the great majority of real property cases. As pointed out in *Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912), much of the land in the United States has its source in a federal grant and federal courts might have been engulfed in land litigation if every ejectment or other land case had original jurisdiction in federal court. A more appropriate procedure in most cases, as the District Court pointed out in

*Taylor* v. *Anderson*, is to initiate the suit in state court and then pursue a federal appeal if federal law not applied by state court. This procedure is not, however, available to the Oneidas.

The Oneida Indians' case, as shown by the complaint as amended, is vitally different from *Taylor* and the many "arising under" cases cited by the Second Circuit and by opposing counsel:

*First*, the Oneidas are now and always have been forbidden by federal law to bring their case in the courts of New York State. The alternate procedure available to the plaintiffs in *Taylor* v. *Anderson* is not and never has been available to the Oneidas.

*Second*, until 1958 an Indian tribe was not considered a person competent to bring an action in New York State courts; thus these courts have always been closed to the Oneidas under *state* law as well as federal. By the time Section 11-A of the New York Indian Law had been passed, Congress had enacted 25 U.S.C. 233 which specifically reserved to federal courts actions accruing before September 13, 1952.

*Third*, the United States has guaranteed to the *Oneidas* the "possession" of their Reservation. Following proper petition by the Oneidas, both the Executive and Legislative branches of the United States Government have failed to keep the word of the United States because of an alleged "conflict of interest". Thus the courts of the United States are the only avenue by which the Oneidas can pursue justice and have their day in court.

*Fourth*, this is *not* an ejectment action, nor one whose essential allegation is a right to possession. It is an appeal to the equitable jurisdiction of federal courts based on a very singular factual and legal situation.

*Fifth*, based on the decisions in the *Tuscarora* and *Skokomish* cases, "possession" in the sense of complete dominion and control is not the key to federal court. In neither of these cases

did the Indians have, under state law, a right of possession of the property involved.

## V.

## APART FROM THE SPECIAL FACTS WHICH BRING THIS CASE UNDER 25 U.S.C. 1331, THE BROADER JURISDICTIONAL CONCEPT OF 25 U.S.C. 1362 ALSO APPLIES.

### A. THE WORDS "ARISES UNDER THE CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES" AS USED IN 28 U.S.C. 1362 NEED NOT HAVE THE SAME RESTRICTIVE MEANING AS UNDER 28 U.S.C. 1331.

When Congress enacted 28 U.S.C. §1362, extending the jurisdiction of the federal district courts to entertain suits brought by federally-recognized Indian tribes on questions arising under the Constitution, laws or treaties of the United States, Congress intended to include in this jurisdictional grant a suit brought by a recognized Tribe involving land of which the Tribe had been dispossessed in violation of federal laws and treaties.

The Court below assumed, without analysis, that Congress, when it enacted 28 U.S.C. §1362 in 1966, intended that the conditioning phrase "where in the matter in controversy arises under the Constitution, laws, or treaties of the United States" (28 U.S.C. §1362) would be subject to the "well pleaded complaint rule", a judicially ingrained interpretation of the similar phrase contained in 28 U.S.C. §1331. Plaintiffs assert that this assumption is belied by the legislative history of 28 U.S.C. §1362. Before addressing the legislative history of 28 U.S.C. §1362, this brief will focus on two preliminary points.

First, although the "arising under" phrases of 28 U.S.C. §§1331 and 1362 closely parallel the provision in Article III, Section 2 of the Constitution delimiting the permissible ambit of

federal court jurisdiction, this Court has recognized that the congressional grant of federal court jurisdiction contained in 28 U.S.C. §1331 is less generous than the jurisdiction authorized by the Constitution and that the "well pleaded complaint rule" is not an interpretation of the constitutional language but rather an interpretation of 28 U.S.C. §1331. *Shoshone Mining Co.* v. *Rutler*, 170 U.S. 505 (1900); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959); see *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824); *Louisville & Nashville Ry. Co.* v. *Mottley*, 211 U.S. 149 (1908). Consequently, the decision below was not constitutionally compelled, and the Constitution would permit this Court's reversal. See *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957).

Second, this Court has recently cautioned that "[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." *District of Columbia* v. *Carter*, 93 S.Ct. 602, 604 (1973), citing *Puerto Rico* v. *The Shell Co. (P.R.), Ltd.*, 302 U.S. 253, 258 (1937); see *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 86, 87-88 (1934); *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 433 (1932).

In *District of Columbia* v. *Carter*, this Court was reviewing a decision of the United States Court of Appeals for the District of Columbia that the District of Columbia was a "State or Territory" for the purpose of 42 U.S.C. §1983. The Court of Appeals' decision was founded on a Supreme Court holding that "the District of Columbia is included within the phrase 'every State and Territory' as employed in 42 U.S.C. §1982.... *Hurd* v. *Hodge*, 334 U.S. 24, 31, 92 L. Ed. 1187, 68 S. Ct. 847 (1948)." *District of Columbia* v. *Carter*, *supra*, at 604. In reversing the decision below, this Court stated:

> At first glance, it might seem logical simply to assume, as did the Court of Appeals, that identical words used in two related statutes were intended to have the same effect. Nevertheless, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law..." *Atlantic Cleaners & Dyers* v. *United States, supra,* 286 U.S., at 433, 52 S.Ct., at 609. *District of Columbia* v. *Carter, supra,* at 604.

The relevance of the above language from *District of Columbia* v. *Carter* to the instant case is readily apparent. The Court below in this case automatically assumed that the "arising under" language of 28 U.S.C. §1361 should be interpreted in exactly the same fashion as the "arising under" language of 28 U.S.C. §1331, and in so doing, the Court below clearly violated this Court's standards as enunciated in *District of Columbia* v. *Carter.* Furthermore, as we will demonstrate below, "the logic underlying the Court of Appeals' assumption breaks down completely where, as here, 'there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed...with different intent.' [*Atlantic Cleaners & Dyers* v. *United States, supra,* 286 U.S. at 433; 52 S.Ct., at 609.]" *District of Columbia* v. *Carter, supra,* at 604.

## B. 28 U.S.C. §1362 WAS INTENDED TO BE A REMEDIAL "INDIAN" STATUTE, EXTENDING FEDERAL JURISDICTION TO LAND CASES LIKE THE INSTANT ONE.

The legislative history of 28 U.S.C. §1362 is replete with references indicating that Congress, by enacting 28 U.S.C. §1362 in 1966, understood that federal courts would have jurisdiction of suits presenting for judicial action the issues raised by the instant suit.

In recommending the enactment of what is now 28 U.S.C. §1362, the Judiciary Committee of the House of Representatives noted that:

> "In its report to the Senate Committee, the Department of the Interior specifically pointed out that the issues involved in cases involving tribal lands that either are held in trust or were so held by the United States or are held by the tribe subject to restriction against alienation imposed by the United States are Federal issues. The Department therefore observed that particularly as to this class of cases, it is appropriate that the actions be brought in a U.S. district court." H.R.Rep. No. 2040, 89th Cong., 2d Sess. 3146 (1966).

The Oneida complaint presents exactly the fact pattern which the above language demonstrates was intended by Congress to fall within the ambit of 28 U.S.C. §1362. The Oneidas are suing for lands taken from them allegedly in violation of the Indian Non-Intercourse Act (now 25 U.S.C. §177), by which Congress imposed a restriction against alienation of Indian land throughout the country. Petitioners assert that if the decision of the Court below is affirmed by this Court, the congressional will as expressed in the above quotation will be violated since this case and, indeed, any other case brought by an Indian tribe for lands of which the tribe was dispossessed in violation of the restriction against alienation imposed by the Indian Non-Intercourse Act will not be heard by federal courts.

Furthermore, this same Committee was cognizant that federal courts have jurisdiction over suits brought by the United States as trustee for Indians or Indian tribes (28 U.S.C. §1345), and that, for a variety of reasons, the United States frequently declines to litigate some Indian actions. The Committee stated as a justification for the passage of 28 U.S.C. §1362 that:

> The enactment of this bill would provide for U.S. district court jurisdiction in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action. As is observed in the Department of the Interior report, the tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are

assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys. There is a large body of Federal law which states the relationship, obligations and duties which exists between the United States and the Indian tribes. The Federal forum is therefore appropriate for litigation involving such issues. H.R. Rep. No. 2040, 89th Cong., 2d Sess. 3147 (1966).

This legislative history is again specifically relevant to the instant case. The United States could have instituted this action (see *United States* v. *Boylan*, 265 F. 165 [2d Cir. 1920]; 25 U.S.C. §175), and, in fact, the Oneidas have requested the assistance of the United States. The request was denied because of an alleged conflict of interest, engendered by the Oneidas' suit against the United States in the Indian Claims Commission. If the Oneida Tribes and other Indian tribes are to be afforded the same right to a federal court forum as would the United States suing on their behalf in a trustee capacity, which was certainly the Congress' intent in enacting 28 U.S.C. §1362, this Court must reverse the decision below.

Other instances of Legislative Intent on §1362 are as follows:

(1) The memorandum of the Solicitor General of the United States on certiorari describes the issue under 25 U.S.C. 1362 as turning on whether 1362 should be construed as a statute involving Indian claims or more narrowly as a statute involving the $10,000 limit on federal jurisdiction. This is an accurate description of the 1362 issue, and we submit that the legislative history of 1362 discloses that it is to be interpreted as an Indian statute rather than a jurisdictional statute. In addition to the legislative history, it should be pointed out that the official heading of the bill as submitted to Congress reads as follows:

"AN ACT

To amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the $10,000 limitation, *and for other purposes.*" [Emphasis added.]

Thus removal of the $10,000 jurisdictional limit was not the sole purpose for if it were, the act would not specify "for other purposes". Further, 1362 was included in the chapter analysis of Chapter 85 of Title 28 with the heading "1362 Indian tribes". This it was officially characterized as an *Indian statute* as distinguished from a jurisdictional limit change.

(2) It should be noted further that the legislation did not take the form of an exception to 1331, eliminating the $10,000 requirement as to Indians. It was introduced and passed as a separate statute, which as Judge Lumbard of the Second Circuit pointed out can be considered as an entirely new section with meaning independent of 1331. *Romero* v. *Intl. Terminal Operating Co.*, 358 U.S. 354, 379-380 (1959); *Gully* v. *First National Bank* 299 U.S. 109, 113 (1936); "The Broken Compass", 115 Penn. Law Rev. 890, 891 (1969).

An examination of the legislative history of 1362 confirms the view of the Acting Solicitor of the Department of Interior as set forth in his letter to the United States Solicitor General, dated March 21, 1973, which states in part:

> "We think the legislative history of §1362 clearly shows that it is a statute intended to enable Federally recognized Indian tribes to litigate in the Federal courts all questions pertaining to their rights arising from lands claimed by them. ..." p. 11. 7/

(3) House Report #2040, September 12, 1966, U.S. Code Congr. & Adm. News 1966, pp. 3145-3149, states in its introduction that the purpose of the bill is "to permit Indian tribes to maintain civil actions in federal courts without regard to the $10,000 limitation and *for other purposes.* ..." *Id.* p. 3145. [Emphasis added.]

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7/ Exhibit A of this brief is a reprint of such letter as set forth in the Memorandum of the Solicitor General of the United States to the Supreme Court.

(4) The same House report cites a case similar to the Oneidas', where the U.S. Attorney declines to bring an action: "As is observed in the Department of Interior Report, the tribes would then have access to the federal courts through their own attorneys." *Id.* p. 3147. This example is *not* given in the context of the $10,000 limitation but is, rather, listed as "another factor which is relevant in this situation and serves to emphasize the justification for enactment of this bill." *Id.* p. 3147. The next paragraph of the House Report clearly differentiates the cases where the U.S. Attorney refuses to bring the suit from cases where the $10,000 limitation is applicable.

(5) The House Report contains a letter from Harry R. Anderson, Assistant Secretary of Interior, which refers to lands which are *or were held* by the United States in trust or by a tribe subject to restrictions on alienation, thus indicating that the Indians need not be in possession to sue in Federal Court. *Id.* p. 3148.

(6) The House Report also contains a letter from Ramsey Clark, Deputy Attorney General, setting forth the views of the Department of Justice. He states that "*one of the purposes* of this bill..." is to remove the problem of the $10,000 limitation. *Id.* p. 3149.

(7) The Senate Report adds certain clarification to the House Report. *S. Rep. No. 1507*, August 24, 1966, states in part:

> "...In many instances claims arise under special treaties between the United States and the tribes, but because of the limitation the matter cannot be litigated in Federal courts. As an example, several parcels of land may be claimed by the tribes, each of the parcels being valued at under $10,000 even though the aggregate constitutes more than $10,000. However, these claims may not be added together for the purpose of meeting the jurisdictional amount, and the tribes are denied a Federal forum.
>
> "There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated. Additionally, the Federal

courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

"Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.

"The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys."

Note that the above language refers to several parcels which "may be *claimed* by the tribes". [Emphasis added.] The floor report on this bill, as reported in Congressional Record-Senate, August 26, 1966, p. 19, 885, contains essentially the same language as quoted above in explanation of the purpose of the bill.

(8) With his Memorandum to the Supreme Court on this case, dated May 1973, the United States Solicitor General lodged with the Court a copy of the Congressional hearings on 28 U.S.C. 1362, held July 15, 1966. At these hearings, Senator Quentin N. Burdick, who sponsored the bill gave several examples of its intended application, which are quoted in part below:

"For example, an Indian tribe claims title to a tract of land on the reservation by reason of a treaty or act of Congress. But the value of the land is less than $10,000.

"And I might say, Mr. Chairman, that the fraction there is one of the problems we have in Indian tribes, where there is a multiplicity of ownership in small pieces and small fractions.

"So there may be eight or ten of such parcels, each claimed by different owners. Added together the value of the parcels would exceed $10,000. But the separate value of each parcel cannot be added up to make the $10,000. As a result, a tribe cannot maintain suit in Federal court to establish its right to substantial land areas even though the matter arises under laws or treaties of the United States." at 4.

* * *

"There are cases where a conflict arises on the question of whether land, or minerals, is public land or minerals of the United States or the trust property of a tribe. The Secretary of the Interior has the responsibility for both kinds of land, on request of a public land applicant, unbeknown to the tribe or even the Bureau of Indian Affairs, the Secretary of the Interior issues a patent to the land. The tribe is prohibited from maintaining suit in Federal court to cancel the patent. Only the United States can do that. But the Attorney General will not bring suit unless asked and the Secretary of the Interior, who issued the patent, could not be expected to ask for cancellation because to do so would in effect admit error on his part originally. The tribe may bring suit against the patentee and ask the court to declare the tribe the owner on the ground that the tribe's title depends on Federal laws or treaties. But here again, unless the land has a value in excess of $10,000 the Federal district court has no jurisdiction." at 4, 5.

Both the examples given by Senator Burdick are instances where the Indians would not be in possession of the land involved. The second example very specifically refers to the case where the United States has patented alleged Indian land to a third party, who would presumably then be in possession of it. This is very similar to the Oneidas' case except that it was the State of New York and not the United States which patented the Reservation to the predecessors of the defendants herein. 8/

(9) The Congressional hearings referred to above also contain a statement by Attorney Marvin J. Sonosky, at 12-15, to the Congressional Committee in part as follows:

"I might add one other point, and I should have put it in my memorandum, that as a general proposition state courts have no jurisdiction over civil matters affecting restricted property, or tribal relations of Indians, unless Congress has specifically conferred such jurisdiction. In many instances, particularly in Oklahoma, Congress has conferred such

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8/ A reading of the legislative history of 25 U.S.C. 233 and 28 U.S.C. 1362 clearly shows that Congress, in enacting these sections, had no idea that "arising under" would be given the very restricted meaning adopted by the majority of the Second Circuit.

jurisdiction. Now, this statement can be found in Federal Indian Law at page 363, with supporting citations. Federal Indian Law is a government publication, a Government Printing Office publication, sponsored by the Department of the Interior. It is hard to generalize in these things. But as a general rule this is true. And we feel that Indians, through S. 1336, would be put in at least as good a position as so many of the non-Indians who are permitted to test their rights under Federal laws, treaties and constitutions without regard to the jurisdiction of the court.

Senator Tydings. Thank you very much, Mr. Sonosky. I think you have answered our questions, and any that are left in mind.

I will recommend to the Subcommittee prompt favorable report on this legislation to the full committee." at 14-15.

This statement bears out, not only the general remedial intent of 1362, but also the fact that in the State of Oklahoma where *Taylor* v. *Anderson* originated, the state courts have jurisdiction over Indian land cases. Compare 25 U.S.C. 233 and 28 U.S.C. 1360.

The Oneidas' view of 1362 and its impact upon federal jurisdiction was adopted by Judge Lumbard of the Second Circuit in his dissenting opinion and also has been adopted by the Ninth Circuit Court of Appeals in the case of *Fort Mojave Tribe* v. *Lafollette*, No. 71-1967 (9th Cir., May 16, 1973). The opinion in this case is reproduced as Exhibit B to this brief and was called to the attention of the Supreme Court by the Solicitor General of the United States in a supplemental memorandum to the Supreme Court.

A further case upholding the Oneidas' view of the effect of 1362 is the case of *Salt River Pima-Maricopa Indian Community* v. *Arizona Sand and Rock Co.*, No. Civ. 72-376-Phx. (D. Ariz., Dec. 11, 1972), an unreported decision filed in December 1972 after the Oneidas' petition for certiorari was filed. A copy of this decision is reproduced as Exhibit C to this brief.

Two law review articles recently published have also analyzed this case from the viewpoint of 28 U.S.C. 1362. In "*Federal*

*Question Jurisdiction in Cases Involving Indian Land*", by Gail Alpern, 39 Brooklyn Law Review 880 (1973), the author states:

> "Section 1362 of Title 28 of the United States Code (hereinafter referred to as Section 1362) was also enacted to define the unique status of the Indians within the scheme of federal jurisdiction. The legislative history of this statute reveals that it was enacted to do more than merely abrogate the need for civil actions of this kind to meet the required jurisdictional amount. It also provides 'the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys'."

In "*Toward a New System for the Resolution of Indian Resource Claims*", 47 N.Y.U. Law Rev. 1107 (1972), the author analyzed 28 U.S.C. 1362 and concludes as follows:

> "Based on this analysis, it is submitted that to determine the scope and purpose of section 1362, one must consider its historical background and the problems its passage sought to remedy. The legislative history of section 1362 indicates that its primary purpose was to remove the amount in controversy requirement in suits brought by Indian tribes; however, the history does not limit the purpose of the act to this alone. In fact, examples of the applicability of the bill given by the Committee reports indicate that Congress expected that certain actions which would be denied jurisdiction under the well-pleaded complaint rule, such as those in ejectment, should be heard in federal courts. Thus, the legislative history may be the basis for giving a broader meaning to the 'arising under' clause of section 1362 than is presently given to the 'arising under' clause of section 1331. Moreover, it is a general rule of construction that statutes applying to Indians, and remedial statutes generally, are to be construed liberally. Therefore, when one considers that the section manifests Congress' concern for its grant of jurisdiction liberally, as was done in the *Salt River* decision, is compelling."

**SUMMARY: 28 U.S.C. 1362**

Under the legislative history noted above, and following the two Ninth Circuit cases included as Exhibits B and C, it is our conclusion that 28 U.S.C. 1362 was intended to be enacted as a jurisdictional relief statute for Indians and should not be given the strict "arising under" interpretation heretofore used under 28 U.S.C. 1331.

## CONCLUSION

This suit is brought under three federal treaties which guarantee to the plaintiffs, the Oneida Indians, the *possession* of the specific land in question. According to the Court below, the lack of such possession precludes federal court jurisdiction; if this be so, then the lack of that which is guaranteed by the treaties also precludes the treaties' implementation.

As the legal principles are applied to our facts by the Court below, the three treaties and 28 U.S.C. 1331 and 1362 cancel each other out. That condition which brings the treaties into play also renders them unenforceable; this is not the intent of the treaties or the laws.

Under the very singular facts before this Court, 25 U.S.C. 1331 and 1362 should be applied in favor of federal court jurisdiction.

Respectfully submitted,

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July 18, 1973.

**Exhibit A — Excerpt from letter from Acting Solicitor of the Department of Interior to Solicitor General of the United States.**

"To us the significance of the *Oneida* case is the interpretation which should be accorded to 28 U.S.C. § 1362. By two-to-one decision, the Second Circuit has concluded that the "well-pleaded complaint rule" developed as a result of interpreting 28 U.S.C. § 1331 must also be applied to § 1362.

We think the legislative history of § 1362 clearly shows that it is a statute intended to enable Federally recognized Indian tribes to litigate in the Federal courts all questions pertaining to their rights arising from lands claimed by them. As both the petitioners and the Native American Rights Fund as *amicus curiae* point out respectively in their petition and brief, unless the Federal courts have jurisdiction of such a claim as presented by the Oneidas it may not be litigated since state courts have no jurisdiction to try suits involving rights to Indian lands.

Indicative of the Congress' intent that all Indian land cases may be litigated by Federally recognized Indian tribes in Federal courts pursuant to § 1362 is the following portion of the statement contained in Senate Report No. 1507, 89th Congress, 2nd Session, reporting on S. 1356, which became § 1362. The portion of the statement to which we refer appears on page 2 of Report No. 1507 and reads as follows:

"There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have

Exhibit A — Excerpt from letter from Acting Solicitor of the Department of Interior to Solicitor General of the United States.

had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

"Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.

"The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys."

The present case classically illustrates an instance of what the Senate Judiciary Committee had in mind, for the suit is brought by tribal attorneys since the United States, which is defending against an Oneida claim filed pursuant to the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* involving aspects of the claim being pursued by the Oneida Nation against Oneida and Madison County, declined to file an action on behalf of the Nation.

I shall appreciate your bringing the foregoing views of the Department of the Interior to the attention of the Court."

**Exhibit B — Opinion.**

*IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

No. 71-1967

THE FORT MOJAVE TRIBE

*v.*

WILLIAM L. LAFOLLETTE ET AL.

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*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA*

[May 16, 1973]

Before: HAMLIN, BROWNING AND WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal from an order dismissing an amended complaint on the ground that the United States was an indispensable party to the litigation. The appellant, an Indian tribe acknowledged by the government pursuant to statute [25 U.S.C. §476], brought suit to quiet title as against claims of the defendants to land in Arizona. The complaint did not allege who was in possession but asserted that defendants made some claim adverse to the title of the tribe.

The tribe asserts a superior right under Executive Order No. 1296, February 2, 1911, by which the United States withdrew from settlement certain land in (the territory of) Arizona and set it apart

> "as an addition to the present Fort Mojave Indian Reservation . . ., for the use and occupation of the Fort Mojave and such other Indians as the Secretary of the Interior may see fit to settle thereon."

Defendants moved to dismiss the action on several grounds, including lack of subject matter jurisdiction and failure to join an indispensable party. The latter ground was the one relied upon by the district court in dismissing without prejudice. It was the view of the trial judge that the Executive Order did not transfer title and no trust patent had been issued to the land in question, leaving title in the government.[1]

## I.

### *THE INDISPENSABLE PARTY ISSUE*

Without joining the United States, an Indian tribe may sue in its own right to protect its interest in restricted land. *Choctaw & Chicasaw Nations* v. *Seitz,* 193 F. 2d 456 (10th Cir. 1951). It is of no consequence that no trust patent had been issued for the land involved. *See Skokomish Indian Tribe* v. *France,* 269 F. 2d 555 (9th Cir. 1959).

As the United States will not be bound by any determination made in a suit to which it is not a party, *United States* v. *Candelaria,* 271 U.S. 432 (1926),

> "It does not appear that failure to join the United States would radically and injuriously affect its interest nor will a final determination be inconsistent with equity and good conscience." *Salt River Pima-*

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[1] Defendants urge this court to uphold the order of dismissal on the grounds that the federal court in Arizona was without jurisdiction because the land in question was in California. Plaintiff replies that by virtue of the Interstate Compact Defining Boundary between the States of Arizona and California, approved by Congress August 11, 1966, Stat. , the land is in Arizona. Obviously this is a factual question which should be resolved by the trial court in the first instance.

*Maricopa Indian Community* v. *Arizona Sand and Rock Co.*, 353 F. Supp. 1098, 1101 (D. Ariz. 1972).

Our *Skokomish* decision is controlling here, and the order of dismissal was improper.

## II.

### *JURISDICTION OF THE DISTRICT COURT*

The appellant Indian tribe's claim of federal jurisdiction is based on 28 U.S.C. §1362.[2] Defendants argue that §1362 retains the requirements for federal question jurisdiction that have been judicially engrafted onto 28 U.S.C. §1331, and that these have not been met here.

It is doubtful that the requirements of §1331 are met in the present case whether the plaintiff's suit be styled

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[2] 28 U.S.C. §1362 provides:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

**Exhibit C — Memorandum and Order.**

"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY,

Plaintiff,

vs.

ARIZONA SAND AND ROCK COMPANY,
an Arizona corporation; SALT RIVER
VALLEY WATER USERS' ASSOCIATION,
an Arizona corporation, et al.,

Defendants.

No. Civ 72-376-Phx.
MEMORANDUM
AND ORDER

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Before the court are motions to dismiss for lack of jurisdiction by Mesa Sand and Rock, Inc., John L. Merrill, Mrs. John L. Merrill, John L. Merrill, Administrator of the Estate of Ira L. Merrill, Sarah Ann Ickes, John Doe Ickes, husband of Sarah Ann Ickes, Gilbert Allen Merrill and Mrs. Gilbert Allen Merrill, Ira Keith Merrill and Mrs. Ira Keith Merrill, and by defendant Arizona State Highway Commission along with a motion to dismiss for failure to state a claim upon which relief may be granted by defendant United States. There is in addition a petition by the plaintiff for an order to show cause why the U. S. Attorney should not be ordered to prosecute suit on behalf of the tribe. Further, the defendants Arizona State Highway Commission have also moved to join the United States as a necessary or indispensible party. The motions of the private and corporate defendants rely upon Shulthis

as an action in ejectment[3] or one to quiet title.[4] But we agree with the dissenting opinion of Judge Lumbard in *Oneida Indian Nation of New York State* v. *County of Oneida,* 464 F. 2d 916, 924 (2d Cir. 1972) that Congress intended by §1362 to authorize an Indian tribe to bring suit in federal court to protect its federally derived property rights in those situations where the United States declines to act. *Accord: Salt River Pima-Maricopa Indian Community* v. *Arizona Sand and Rock Company, supra.* As so interpreted the statute is clearly constitutional. *Osborn* v. *Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824).

*Scholder* v. *United States,* 428 F. 2d 1123, 1125 (9th Cir. 1970), and *Quinault Band of Indians* v. *Gallagher,* 368 F. 2d 648, 656 (9th Cir. 1966), do not hold otherwise.

Reversed and remanded.

[3] The action was designated an action to quiet title but there is no allegation the plaintiff is presently in possession of the lands in controversy. If plaintiff is out of possession it has an adequate remedy at law in ejectment and an action to quiet title will not lie. *Whitehead* v. *Shattuck,* 138 U.S. 146 (1891); *Oneida Indian Nation of New York State* v. *County of Oneida,* 464 F. 2d 916 (2d Cir. 1972); *cf. Roubedeaux* v. *Quaker Oil & Gas Co.,* 23 F. 2d 277 (8th Cir. 1927). But if the plaintiff's proper remedy *is* an action in ejectment "a long and unbroken line of Supreme Court decisions holds that the complaint in such an action presents no federal question [under 28 U.S.C. §1331] even when a plaintiff's claim of right or title is founded on a federal statute, patent or treaty [cits omitted]." *Oneida Indian Nation, supra* at 920.

[4] While an action to quiet title will present a federal question under 28 U.S.C. §1331 if the complaint alleges a substantial controversy between the parties regarding the interpretation or effect of federal law, *Skokomish Indian Tribe* v. *France,* 269 F. 2d 555 (9th Cir. 1959), the present complaint includes no such allegation.

"[A] controversy in respect of lands has never been regarded as presenting a Federal question merely becuase one of the parties to it has derived his title under an act of Congress." *Shulthis* v. *McDougall,* 225 U.S. 561 (1912).

v. McDougal, 225 U.S. 561 (1911) which held that under the well pleaded complaint rule jurisdiction is insufficient where the only federal ingredient in the suit is that the plaintiff's title was derived from the United States. The United States has moved to dismiss count two of the complaint which asks for a writ of mandamus under 28 U.S.C. 1361, ordering the Department of Justice to prosecute the allegations of trespass levied against the private and corporate defendants in count one of the complaint. For the following reasons the court has determined that this court has jurisdiction, that the complaint states no grounds upon which to issue the writ of mandamus, and further that the United States is not an indispensible party.

Under 25 U.S.C. 175 the United States Attorney has authority to represent Indians in all suits at law and in equity. Under recent 9th Circuit decisions this authority has been held discretionary. Rincon Band of Mission Indians v. Escondido Mut. Wat. Co., 459 F.2d 1082 (1972); United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d (1958) and Siniscal v. United States, 208 F.2d 406 (1953). It is clear that should the United States choose to exercise its discretion it could file suit in this case under 28 U.S.C. 175 and as guardian and trustee for the tribe. United States v. Kagama, 118 U.S. 375 (1886), United States v. Sandoval, 231 U.S. 28 (1913), etc.

[In 1966 Congress passed 28 U.S.C. 1362 upon which the complaint herein relies for jurisdiction and which provides that the district courts are to have original jurisdiction of all civil actions brought by Indian tribes or bands wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Judge Friendly held in Oneida Indian Nation of N. Y. State v. County of Oneida, N.Y., 464 F.2d 916,

919 note 4 (1972) that the sole purpose of §1362 was to remove any requirement of jurisdictional amount. Contrary to Judge Friendly's holding and consistant with Judge Lumbard who dissented in the Friendly decision this court finds that House Report No. 2040, which accompanied S. 1356 (28 U.S.C. 1362), indicates that in addition to removing the $10,000 jurisdictional requirement of 28 U.S.C. 1331 the effect of the bill would be to provide the means whereby the tribes are assured of the same judicial determination whenever the government chooses not to exercise its discretion and declines to bring the action. U.S.C.C. & A.N. 1966, p. 3147. Reading these sections (25 U.S.C. 175, 28 U.S.C. §§1331 and 1362) together it is apparent that this court has under §1362 a statutory grant of jurisdiction in this matter. Under §1362 any case which might have been brought by the United States is deemed to be one arising under the Constitution, laws or treaties of the United States if it is brought on behalf of an Indian tribe by their own attorneys.]

In its petition for order to show cause and subsequent memoranda the plaintiff relies upon 43 U.S.C. 1457, 28 U.S.C. §§519 and 547, and 25 U.S.C. 175 as a basis for its contention that the United States has a duty to prosecute the charges in the complaint. In addition plaintiff establishes that the United States is a trustee of the land in question for the Indians and as such has a duty to obtain redress from those who trespass upon it. Neither theory creates a duty upon the United States. As stated above there is no duty under 25 U.S.C. 175 which requires the United States to pursue any civil action on behalf of a tribe (Rincon Band of Mission Indians, supra) and the plaintiff concedes that §175 is not mandatory. If that statute does not require representation, then there is no compelling rationale which would create a duty as the result of

the trust relationship and the plaintiff cites no authority for such.

Mandamus is not available as a means of compelling government officials to perform their discretionary functions in any particular way. It empowers a court only to enforce ministerial duties, not to perform discretionary acts involving the exercises of judgment. Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966). None of the statutes relied upon by the plaintiff expressly establish a duty of the United States to provide legal representation to the plaintiff. Further there are no specific factual allegations to support the contention that federal defendants have arbitrarily and wrongfully refused to undertake appropriate litigation.

The United States and the defendant Arizona Highway Commission have both pointed out in their memoranda that alleged trespassers were operating under permits, agreements and licenses issued or ultimately derived through various branches of the United States government. The plaintiff does not deny this and a letter written by Assistant Secretary Loesch, Bureau of Land Management, and attached to the United States supplementary memorandum, supports this allegation. On the basis of the record before it the court must conclude that should the United States represent the tribe in this matter ultimately a conflict of interest would result and therefore it is within the sound discretion of the Attorney General to refuse to do so.

The motion to join the United States as an indispensible party is denied. In this matter this court is bound by the 9th Circuit decision of Skokomish Indian Tribe v. France, 269 F.2d 555, 560 (1959). It does not appear that failure to join the United States would radically and injuriously affects its interest nor will

a final determination be inconsistent with equity and good conscience. The defendants may raise all the issues with regard to ownership and control of the land that might be raised by the United States. Further if it should be determined that the United States has power to authorize the entry then it will be found that in fact there could be no trespass.

THEREFORE IT IS ORDERED and this does order that the motions of defendants Mesa Sand and Rock, Inc., John L. Merrill, Mrs. John L. Merrill, John L. Merrill, Administrator of the Estate of Ira L. Merrill, Sarah Ann Ickes, John Doe Ickes, husband of Sarah Ann Ickes, Gilbert Allen Merrill and Mrs. Gilbert Allen Merrill, Ira Keith Merrill, Mrs. Ira Keith Merrill and the Arizona State Highway Commission to dismiss for lack of jurisdiction be and the same is hereby denied, as is the motion of the Arizona State Highway Commission to join the United States under F.R.C.P. 19 as an indispensable party.

Further, inasmuch as the defendant United States has shown, pursuant to the order to show cause, that the decision to prosecute on behalf of the tribe is a discretionary one and the decision of the United States not to prosecute was not an abuse of that discretion therefore the motion to dismiss the claim against the defendant United States be and the same is hereby granted.

Further the defendants are granted 20 days within which to further plead.

Done and dated this 11th day of December, 1972.

s/ W.D. MURRAY
W. D. Murray
Senior United States
District Judge."